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No. ____

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

ABC, INC., d/b/a ABC BOOKS, INC.;
GENERAL VIDEO MIDWEST, INC.; and
DAVID SWANSON,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the federal sentencing guidelines are applicable under circumstances where the defendants were convicted of an ongoing offense initiated before the guidelines went into effect, but acquitted of all alleged criminal activity occurring after the effective date of the guidelines.

2. Whether the imposition of a two level increase for obstruction of justice is warranted pursuant to Section 3C1.1 of the federal sentencing guidelines where a defendant's use of an alias was neither intended to impede, nor actually resulted in any hindrance to, the administration of justice.

3. Whether the imposition of a four level increase pursuant to Section 3B1.1 of the federal sentencing guidelines for the role in the offense is appropriate based solely upon a defendant's status as an officer of the co-defendant corporations and absent specific findings regarding the size of the criminal organization and the defendant's degree of responsibility therein.

4. Whether the evidence adduced at trial is sufficient to sustain a corporate defendant's conviction for conspiracy to transport obscene material through interstate commerce where the substantive counts in which it was charged and the overt acts alleged in furtherance of the conspiracy did not involve obscenity, but rather, established only an agreement to transport constitutionally protected speech material.

[**Note:** Petitioner Swanson reserves the right to argue Question 5 on the merits in the event certiorari is granted, but does not include Question 5 among the reasons for granting certiorari.]

5. Whether the evidence adduced at trial is sufficient to sustain a defendant's convictions where the government failed to establish the defendant's involvement in any alleged criminal activity beyond his status as a corporate officer of the co-defendant corporations.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

COME NOW the Petitioners, ABC, Inc., d/b/a ABC Books[1], General Video Midwest, Inc.[2], and David Swanson, by and through their attorneys, and hereby petition this Honorable Court to issue a writ of certiorari to review the judgment and opinion entered by the United States Court of Appeals for the Eighth Circuit in the above-entitled action.

1 Petitioner ABC, Inc., d/b/a ABC Books, Inc. has no parent companies or subsidiaries to list pursuant to Rule 29.1 of the Supreme Court Rules.

2 Petitioner General Video Midwest, Inc. has no parent companies or subsidiaries to list pursuant to Rule 29.1 of the Supreme Court Rules.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit has not been reported to date, but is reprinted in the Appendix to the Petition for a Writ of Certiorari (hereinafter "Appendix"), at App. 1. The order denying a Petition for Rehearing and Suggestion for Rehearing En Banc is also reproduced in the Appendix, at App. 32.

JURISDICTION

Petitioners seek review of the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered on April 26, 1991, which affirmed Petitioners' convictions entered by the United States District Court for the District of Nebraska on April 30, 1990. *See* Appendix, App. 1. Thereafter, a timely filed Petition for Rehearing and Suggestion for Rehearing En Banc was denied on June 3, 1991. *See* Appendix, App. 32. This Petition for Certiorari was filed within ninety days thereof.

The Eighth Circuit's decision is a final judgment since it affirmed the district court's judgment which was final within the meaning of 28 U.S.C. Section 1291. Jurisdiction of this Court to review the judgment and opinion of the Eighth Circuit in this criminal action is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS

The pertinent portions of Title 18 U.S.C. Sections 371 and 1462, together with the relevant provisions of the *Federal Sentencing Guidelines Manual*, Sections 2G3.1, 3B1.1 and 3C1.1, promulgated by the United States Sentencing Commission pursuant to 28 U.S.C. Section 994, are set forth verbatim in the Appendix hereto, at App. 35-App. 52.

STATEMENT OF THE CASE

In or about April, 1987, the Lincoln Police Department, in conjunction with the Federal Bureau of Investigation, initiated an investigation into the interstate transportation of allegedly obscene material in Lincoln, Nebraska. The target of the investigation in the instant case was "Cinema X," an adult establishment located in the City of Lincoln. Cinema X is owned and operated by Petitioner ABC, Inc., a foreign corporation licensed to conduct business and doing business in Nebraska. Petitioner David Swanson was president of said corporation and Steve Brooks, a former co-defendant, was employed by ABC, Inc. as the manager of Cinema X.

The Lincoln Police Department instigated its covert investigation of Cinema X on or about April 10, 1987. During the course of the investigation, from April 1987 until May 1988, Officer Jerry Lowe of the Lincoln Police Department periodically patronized Cinema X in an undercover capacity. Throughout the period of the investigation, Officer Lowe rented a total of 12 videocassette tapes. Each of the videotapes selected by Officer Lowe was a special order not regularly stocked in the store. Several of these videotapes were ordered for Officer Lowe, by Brooks, from Petitioner General Video Midwest, Inc. General Video Midwest is an Illinois corporation of which Swanson was also an officer. Notably, only three of the twelve videotapes rented by Officer Lowe were actually purchased and selected for prosecution in this case.

At the conclusion of the investigation, a four count indictment was filed in United States District Court for the District of Nebraska against Petitioners, as well as former co-defendant Brooks, on January 31, 1989.

Jurisdiction was conferred upon the district court pursuant to 18 U.S.C. Section 3231. Count I of the indictment charged the two corporations and the two individuals with conspiring to transport obscene material in interstate commerce in violation of 18 U.S.C. Section 371. Counts II and IV charged each of them with substantive offenses involving the use of an express company or other common carrier to transport obscene material in violation of 18 U.S.C. Section 1462. Count III charged only Petitioners ABC, Inc. and Swanson, along with Brooks, with an additional substantive offense involving the violation of 18 U.S.C. Section 1462.

Prior to trial, Brooks entered into a plea agreement with the Government. Pursuant to the agreement, all of the charges pending against Brooks in the instant case were dismissed and he agreed to cooperate in testifying as a witness for the Government in the trial of the Petitioners herein.

A jury trial was commenced on December 18, 1989, the Honorable Warren K. Urbom presiding. At trial, Brooks testified that the videotapes selected by Officer Lowe were not regularly stocked in the store and had to be special ordered. At no time did Swanson participate in perfecting these special orders. Officer Lowe corroborated Brooks' testimony, stating that at no time did he recall hearing Swanson's name mentioned in connection with the ordering or shipping of the subject videotapes.

At the conclusion of the Government's case, Petitioners' motion for a judgment of acquittal on the basis of insufficient evidence was summarily denied by the trial court. Subsequent renewals of this motion were similarly denied. *See* Appendix, App. 6. Petitioners were

convicted of Counts I and III of the indictment and acquitted of all remaining counts. However, the trial court vacated the conviction as to General Video Midwest on Count III because it was not charged in that count of the indictment. *See* Appendix, App. 7.

On April 27, 1990, Petitioners were sentenced under the Sentencing Reform Act of 1984, over their objection that the federal sentencing guidelines were inapplicable to Petitioners' offenses of conviction because they had been acquitted of all alleged criminal activity occurring after the effective date of the guidelines. *See* Appendix, App. 10. Overruling their objection, the trial court sentenced the Petitioner corporations accordingly, assessing a fine against ABC, Inc. in the amount of $60,000 as to each of the Counts I and III, and discharging it as to the remaining counts of which it was acquitted. *See* Appendix, App. 23. General Video Midwest was fined $80,000 as to Count I, and discharged as to the remaining counts. *See* Appendix, App. 25. In sentencing Petitioner Swanson, the trial court increased Swanson's guideline range by four levels pursuant to Section 3B1.1 of the federal sentencing guidelines for role in the offense based upon Swanson's status as president of the convicted corporations. *See* Appendix, App. 10. The court further enhanced Swanson's guideline range by two levels pursuant to Section 3C1.1 for obstruction of justice based upon his use of an alias. *See* Appendix, App. 10. Accordingly, Petitioner Swanson was sentenced to a 24-month term of imprisonment on each of the Counts I and III, to run concurrent as to each count. In addition, the trial court ordered Swanson to pay a fine in the amount of $46,861.71, and discharged him as to the remaining counts of which he was acquitted. *See* Appendix, App. 27. The final orders of judgment were entered on April 30, 1990. *See* Appendix, App.23 - App. 31.

Petitioners appealed their convictions to the United States Court of Appeals for the Eighth Circuit. On April 26, 1991, the Eighth Circuit affirmed Petitioners' convictions and sentences in all respects. *See* Appendix, App. 1. Petitioners timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc which was denied on June 3, 1991. *See* Appendix, App. 32. However, the Eighth Circuit granted Petitioners' motion to stay the issuance of the mandate pending the filing of the within Petition. *See* Appendix, App. 33 - App. 34.

REASONS FOR GRANTING THE WRIT

I.

THE FEDERAL SENTENCING GUIDELINES ARE NOT APPLICABLE UNDER CIRCUMSTANCES WHERE THE DEFENDANTS WERE CONVICTED OF AN ONGOING OFFENSE INITIATED BEFORE THE GUIDELINES WENT INTO EFFECT, BUT ACQUITTED OF ALL ALLEGED CRIMINAL ACTIVITY OCCURRING AFTER THE EFFECTIVE DATE OF THE GUIDELINES

Pursuant to 28 U.S.C. Section 994, the United States Sentencing Commission promulgated detailed guidelines prescribing sentences for offenders convicted of federal crimes. The federal sentencing guidelines took effect automatically on November 1, 1987, and are applicable to offenses committed thereafter. *See* 18 U.S.C. Section 3551. As a general principle of law, the guidelines are also applicable to certain ongoing offenses initiated before November 1, 1987, but continuing in existence after that date. In *United States v. Walker*, 885 F.2d 1353 (8th Cir. 1989), for example, the Eighth Circuit held that since conspiracy is a continuing offense, the trial court

may sentence a conspirator under the sentencing guidelines for a conspiracy that was formed before the guidelines took effect, *if* the conspiracy continued after the effective date of the guidelines. *See also*, *United States v. Lee*, 886 F.2d 998 (8th Cir. 1989). Under such circumstances, application of the sentencing guidelines cannot be said to violate the *Ex Post Facto* Clause of the United States Constitution. *United States v. White*, 869 F.2d 822, 826 (5th Cir.), *cert.den.*, 490 U.S. 1112 (1989).

However, the issue in the instant case is whether the sentencing guidelines are applicable to a conviction for conspiracy to transport obscene material initiated *before* November 1, 1987 and which, by virtue of the jury's unequivocal findings, terminated no later than August 3, 1987, months *before* the guidelines took effect. Specifically, Count I of the indictment alleged a conspiracy among Petitioners from "April 10, 1987 and continuously thereafter until. . . May 12, 1988. . . ." Nine overt acts were alleged to have been committed in furtherance of the conspiracy. The first seven acts allegedly occurred no later than August 3, 1987, *before* the guidelines took effect. The only two overt acts alleged to have taken place *after* November 1, 1987 were those acts which served as the basis for the substantive offense charged in Count IV of the indictment, of which Petitioners were acquitted.

More particularly, the last two overt acts allegedly committed in furtherance of the conspiracy alleged that on or about May 12, 1988, a videocassette tape entitled "Bi-Heat Vol. 10" was delivered to Steven Brooks, who, in turn, sold the videotape to an undercover officer in violation of 18 U.S.C. Section 371. Moreover, the *only* substantive count that occurred after the effective date of the guidelines was Count IV, which specifically charged, *inter alia*:

B. The above violation was committed and carried out in the course of and in furtherance of the conspiracy set forth in Count I of this Indictment, while the defendants named therein were members of the conspiracy.

The jury found Petitioners not guilty of Count IV, thus, specifically rejecting the Government's express allegation that the acts charged in Count IV were "carried out in the course of and in furtherance of the conspiracy set forth in Count I. . . ." The trial court, nevertheless, ruled that the conspiracy continued after the effective date of the sentencing guidelines.

Contrary to the Eighth Circuit's decision in the instant case, the fact that the jury rejected the Government's allegations that the last two overt acts were illegal and part of the conspiracy is crucial. In an analogous case, the Ninth Circuit found that a defendant convicted of voluntary manslaughter, but acquitted of first degree murder, should not have been sentenced on the basis of the district court's finding that the defendant's conduct exhibited an intent to kill or do serious bodily harm, stating:

> We would pervert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted. . . . A sentencing court should not be allowed to circumvent th[e] statutory directive [that voluntary manslaughter is less serious than murder] by making a finding of fact—under any standard of proof—that the jury has necessarily rejected by its judgment of acquittal. *United States v. Brady*, 928 F.2d 844, 851 (9th Cir., March 18, 1991).

In the instant case, too, the jury's determination that Count IV, encompassing the two above-referenced overt acts, was not illegal and not part of the conspiracy, should not be circumvented by the trial court's subsequent finding that the conspiracy continued after August, 1987.

Moreover, the Eighth Circuit's decision in this case is contrary to *United States v. Davis*, 718 F. Supp. 8 (S.D.N.Y. 1989), where the court determined that the sentencing guidelines did not apply to a conspiracy which began before November 1, 1987 and continued after November 1, 1987, where the *bulk* of the criminal activity alleged took place before the effective date of the guidelines. The instant case is far more compelling than *Davis*. Unlike *Davis*, *all* of the alleged criminal activity was found by a jury to have occurred prior to November 1, 1987. In addition, unlike *Davis* where the defendants were *convicted* of a substantive count involving overt acts occurring after November 1, 1987, Petitioners herein were *acquitted* of the only substantive offenses alleged to have occurred after November 1, 1987.

Equally as important is the fact that the alleged conspiracy charged in the instant case involved speech material presumptively protected by the First Amendment. As eloquently articulated by the Sixth Circuit in *United States v. Peraino*, 645 F.2d 548 (6th Cir. 1981):

> The *general rule* that one who joins a conspiracy at any time before it ends may be held responsible for acts and agreements which took place before he joined, *e.g.*, *United States v. Cimini*, 427 F.2d 129, 130 (6th Cir.), *cert. denied*, 400 U.S. 911, 91 S.Ct. 137, 27 L.Ed.2d 151 (1970), *does not control when First Amendment rights are at stake*. In most cases the illegal purposes

> of a federal conspiracy will be illegal in every federal jurisdiction. However, when the agreement alleged is one to distribute materials which constitute expression, the agreement may have both legal and illegal purposes depending on varying community standards. *Id.*, at p. 551-552 (emphasis added).

As such, the government must prove "that a purpose of the conspiracy, at the time the conspirator was a member, involved a community, the standards of which were violated by the film." *Id.*, at p. 552.

Overlooking the distinctions enunciated by the Sixth Circuit in conspiracy cases implicating First Amendment rights, the Eighth Circuit in this case ruled that even though Petitioners herein were found *not* to have engaged in any criminal activity subsequent to November 1, 1987, the guidelines were still applicable because other acts, although not criminal, were committed by them after that date. *See* Appendix, App. 1. However, the conspiracy alleged in Count I specifically charged that Petitioners conspired to ship three *obscene* videotapes in interstate commerce. Only one of those films was found to be obscene and, hence, the remaining two films were implicitly found by a jury to be protected speech material under the First Amendment. Therefore, *any* activity subsequent to the date of the shipment involving the single *obscene* film, in order to be *in furtherance of an agreement to transport obscene material*, would be dependent upon proof that material shipped after November 1, 1987 was, in fact, *obscene*. Otherwise, the activity would constitute overt acts in furtherance not of an unlawful agreement, but of a perfectly proper agreement to transport constitutionally protected speech material.

However, pursuant to the Eighth Circuit's reasoning, taken to its logical conclusion, as long as Petitioners were in the business of distributing any presumptively protected filmfare, *all* of their actions would be considered in furtherance of an agreement to ship *obscene* material by virtue of *one* film that was shipped on July 30, 1987 having been declared obscene. Such a result would make one sale of an obscene film a restraint upon any later sales involving any speech material, contrary to this Court's decision in *Universal Amusement v. Vance*, 445 U.S. 308 (1980). Thus, contrary to the Eighth Circuit's decision, unless and until any acts of Petitioners taken after November 1, 1987 were taken in furtherance of an agreement to transport a film that has been adjudicated *obscene*, those actions cannot be said to have been taken in furtherance of an agreement to transport obscene material. Therefore, these acts could not be considered as activity extending the existence of the conspiracy charged in Count I past the effective date of the guidelines.

Based upon the foregoing arguments and authorities, it is clear that the Eighth Circuit's decision in the instant case is contrary to the decisions of numerous other federal courts and, further, is violative of Petitioners' fundamental rights of freedom of speech as guaranteed to them by the First Amendment to the United States Constitution. Moreover, the Eighth Circuit's decision gives rise to crucial implications involving constitutional constructions of the *Ex Post Facto* Clause, as it relates to the sentencing guidelines, which have not yet been addressed by this Honorable Court. Therefore, the within Petition should be granted by this Court.

II.

THE IMPOSITION OF A TWO LEVEL INCREASE FOR OBSTRUCTION OF JUSTICE PURSUANT TO SECTION 3C1.1 OF THE FEDERAL SENTENCING GUIDELINES IS NOT WARRANTED WHERE A DEFENDANT'S USE OF AN ALIAS WAS NEITHER INTENDED TO IMPEDE, NOR ACTUALLY RESULTED IN ANY HINDRANCE TO, THE ADMINISTRATION OF JUSTICE

Section 3C1.1 of the federal sentencing guidelines provides for a two level increase of the offense level "[i]f the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense ... ." *See* Appendix, App. 40. Jurisdictions have been divided over the question of whether such an increase of the offense level is warranted when a defendant provides an alias to government officials during the course of his criminal proceedings.

In *United States v. Wilson*, 887 F.2d 576 (5th Cir. 1989), *per curiam*, 904 F.2d 234 (1990), the Fifth Circuit held that such an increase for use of an alias was improper in the absence of evidence that the defendant willfully impeded or obstructed the administration of justice, or attempted to do so. However, the Eighth Circuit, holding to the contrary, has determined that a two level increase for obstruction of justice may be appropriate under those circumstances. *See e.g., United States v. Blackman*, 904 F.2d 1250 (8th Cir. 1990) [affirming district court's two level enhancement of sentence for the defendant's use of an alias regardless of whether there was actual prejudice to the government].

In an effort to clarify for sentencing courts the applicability of the obstruction of justice enhancement, the Federal Sentencing Commission issued proposed amendments to Section 3C1.1 which automatically went into effect on November 1, 1990. In light of the amendments, it becomes abundantly clear that it was not the Commission's intent to increase a defendant's offense level for obstruction of justice based upon the use of an alias. Specifically, the Sentencing Commission announced that "providing a false name or identification document at arrest, except where such conduct *actually* resulted in a significant hindrance to the investigation or prosecution of the instant offense does not warrant an enhancement for obstruction of justice." *See, Federal Sentencing Guidelines Manual*, Section 3C1.1, Application Note 4(a) (Nov. 1990), reprinted in Appendix hereto, at App. 40 (emphasis added).

In the instant case, the trial court increased Petitioner Swanson's offense level by two levels purportedly for giving an alias to government officials at the time of his arrest and during the course of the proceedings. However, the trial court made absolutely *no* factual findings that Swanson's use of an alias constituted a material falsehood intended to impede or resulting in a hindrance to the Government's investigation or prosecution of this case. *See* Appendix, App. 10.

Although it is technically true that Petitioner Swanson's birth name is Michael Elmer Mohapp, what the trial court failed to consider is the fact that Petitioner has used the name "Swanson" for approximately 25 years and, therefore, certainly was not utilizing that "alias" for the purpose of attempting to impede the administration of justice. To the contrary, Swanson *voluntarily*

surrendered in the instant case when the indictment was returned, and perhaps more importantly, *all* of Petitioner's criminal history utilized to calculate his guideline range was listed under the name of "Swanson." In fact, the Government was fully aware of Petitioner's true identity and that the purpose for his utilizing an "alias" was to begin a new life following his horrifying experiences in Viet Nam which were similar to those experiences which caused countless Americans to desert or flee to other countries, but for whom amnesty was subsequently granted. *See* Appendix, App. 10. Clearly, Swanson's use of an alias was not intended to impede the administration of justice, nor did it actually hinder the judicial process in any way.

On appeal, the Eighth Circuit recognized that the commentary to Section 3C1.1 directly contradicts its prior holding in *Blackman*. However, because Petitioner Swanson's sentence of 24 months straddles the guideline range, the Court regarded the issue as nonappealable and, contrary to numerous other circuit courts, refused to review the matter. *See* Appendix, App. 1.

Specifically, in the instant case, the trial court's two level increase for obstruction of justice increased Swanson's offense level from a level 15 to a level 17. This enhancement increased the sentencing range from 18-24 months to 24-30 months. The 24-month sentence imposed by the trial court, therefore, falls within the ranges specified for both offense levels.

In *United States v. Bermingham*, 855 F.2d 925, 934 (2nd Cir. 1988), the Second Circuit engaged in a lengthy and detailed discussion concerning the appealability of overlapping sentences. The general rule articulated by the Court is that "disputes about applicable guidelines

need not be resolved where the sentence falls within either of two arguably applicable guideline ranges *and* the same sentence would have been imposed under either guideline range." *Id.*, at p.934 (emphasis added). However, a situation in which the trial court sentences a defendant at the low end of the sentencing range for the applicable offense level, presents an exception to this general rule, absent evidence that the sentence would have been the same regardless of which sentencing range was ultimately determined to be appropriate. *Id.*[3] "In such situations, it obviously matters which guideline range is applicable, and a judge entertaining such a view could not conscientiously be satisfied that the same sentence would have been imposed simply because it happened to fall at or near the high end of a lower, overlapping guideline range." *Id.*, at p.935.

On the face of the record in the instant case, certainly it cannot be said that the sentence imposed by the trial court against Petitioner Swanson would have been the same under *either* guideline range. To the contrary, the trial court intentionally sentenced Swanson at the low end of the guideline range for the offense level applied so as to distinguish his conduct from more heinous crimes. *See*, Appendix, App. 10.

The foregoing authorities conclusively demonstrate that the Eighth Circuit's decision concerning the issue of a sentencing enhancement for obstruction of justice

[3] The Eighth Circuit's refusal to review guidelines issues involving overlapping sentences where the defendant was sentenced at the low end of the sentencing range for the offense level applied is directly contrary to numerous other federal appellate court decisions. *See e.g., United States v. Tetzlaff*, 896 F.2d 1071 (7th Cir. 1990); *United States v. Williams*, 891 F.2d 921 (D.C. Cir. 1989); *United States v. McCrary*, 887 F.2d 485 (4th Cir. 1989); and *United States v. Vasquez*, 874 F.2d 250 (5th Cir. 1989).

based upon the use of an alias is directly contrary to law and conflicts with the decisions of other federal appellate courts. The Eighth Circuit's further refusal to review Petitioner Swanson's challenge to the applicable guidelines range also conflicts with numerous other federal appellate court decisions and is violative of Petitioner's rights of due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. Therefore, the within Petition should be granted.

III

THE IMPOSITION OF A FOUR LEVEL INCREASE PURSUANT TO SECTION 3B1.1 OF THE FEDERAL SENTENCING GUIDELINES FOR ROLE IN THE OFFENSE IS INAPPROPRIATE WHEN BASED SOLELY UPON A DEFENDANT'S STATUS AS AN OFFICER OF THE CO- DEFENDANT CORPORATIONS AND IN THE ABSENCE OF SPECIFIC FINDINGS REGARDING THE SIZE OF THE CRIMINAL ORGANIZATION AND THE DEFENDANT'S DEGREE OF RESPONSIBILITY THEREIN

Chapter 3B of the *Federal Sentencing Guidelines Manual* permits a sentencing court to adjust the offense level to accurately reflect a defendant's relative culpability based upon his role in committing the offense. More particularly, Section 3B1.1 allows the court to increase the offense level proportionately based upon a determination of whether the defendant was an "organizer or leader" or "manager or supervisor" in criminal activity that "involved five or more participants or was otherwise extensive." *See* Appendix, App. 38.

Although the sentencing guidelines were promulgated, at least in part, to promote uniformity in sentencing, the application of the adjustment for role in the *offense* has varied depending upon the court's interpretation of the term "offense." The District of Columbia and numerous other circuit courts have adopted the plain meaning of the term "offense" as referring to the "offense of conviction."[4] *See, United States v. Williams*, 891 F.2d 921, 925 (D.C. Cir. 1989) [requiring the sentencing court "to look at the defendant's role in the offense of conviction, not his role in any relevant aggravating conduct in which he may have engaged."] A minority of courts, however, interpret the term more broadly to include both the conduct of conviction and all relevant conduct. *See e.g., United States v. Fells*, 920 F.2d 1179 (4th Cir. 1990).

The Sentencing Commission recently amended the guidelines to conform to this latter interpretation. However, the Third Circuit refused to apply the amendments to offenses committed prior to November 1, 1990 because it was uncertain whether they were intended to clarify the earlier language which it found unambiguous, or to change the guidelines. *See, United States v. Murillo*, 933 F.2d 195 (3rd Cir., May 8, 1991). Consequently, the Third Circuit adopted what it termed a "middle ground" approach. Pursuant to the Third Circuit's approach, in determining role in the offense for offenses committed prior to November 1, 1990, a sentencing court "should look both to the acts or omissions of the defendant that satisfied the specific elements of the offense of conviction

[4] Other federal appellate courts adopting the D.C. Circuit's interpretation of the term "offense" in ascertaining whether an adjustment is appropriate based upon a defendant's "role in the offense," include: *United States v. Zweber*, 913 F.2d 705 (9th Cir. 1990); *United States v. Petit*, 903 F.2d 1336 (10th Cir.), *cert. den.*, ___ U.S. ___, 111 S.Ct. 197, 112 L.Ed.2d 159 (1990); and *United States v. Tetzlaff*, 896 F.2d 1071 (7th Cir. 1990).

and to those that brought about the offense of conviction. . . ." *Id.*, at pp. 199-200, *accord*, *United States v. Manthei*, 913 F.2d 1130 (5th Cir. 1990).

In light of this division among the circuits, the trial court's failure to make adequate findings of fact to support its four level increase in the instant case becomes particularly acute. Based upon an examination of the record in the instant case, it is impossible to determine what conduct of Petitioner Swanson was considered in increasing his offense level for role in the offense.

Specifically, the trial court in the instant case made virtually no findings concerning Swanson's actual role in the interstate transport of the single videotape the jury determined to be obscene, nor did the court make any findings concerning the size or scope of the criminal activity in the shipment of the videotape. Certainly the interstate shipment of one obscene videotape ordered by a police officer does not, in and of itself, constitute extensive criminal activity sufficient to warrant a four level increase. A single violation of law committed by a corporation engaged in the otherwise lawful business of selling presumptively protected speech materials (as determined by the jury) should not render the entire business an extensive criminal enterprise.

Moreover, the trial court failed to make a specific finding as to whether Swanson was an "organizer or leader" under Section 3B1.1(a), nor did the court attempt to distinguish Swanson's role in the criminal activity from that of a "manager or supervisor" as set forth in Section 3B1.1(b). *See*, *United States v. Lanese*, 890 F.2d 1284, 1293 (2nd Cir. 1989); and *United States v. Silverman* 889 F.2d 1531, 1540 (6th Cir. 1989) [both remanded for findings of fact on number of participants under Section 3B1.1]. The trial court's failure to make specific findings is

particularly troublesome in the instant case because the evidence at trial established that Swanson had absolutely nothing to do with the ordering, shipping, receiving, or selection of *any* videocassette tapes, let alone the single videotape that was actually determined to be obscene. Further evidence established that Swanson only came to the store three times a year, and was only actually observed on the premises on one occasion during the course of the year-long investigation.

The trial court apparently based the four level increase solely on the fact that Swanson was president of the two corporations. *See* Appendix, App. 10. However, the mere fact that Swanson held the title of president is not sufficient to establish that he was a member of a conspiracy. *See, United States v. American Grain & Related Industries*, 763 F.2d 312, 318 (8th Cir. 1985). Furthermore, given the specific distinctions contained in Section 3B1.1, surely the title of president, standing alone, is insufficient to justify a four level increase. This is strongly confirmed by Application Note 3 of the commentary to Section 3B1.1 which lists the factors to be considered in determining a defendant's role and expressly states that titles are "not controlling" in "distinguishing a leadership or organizational role from one of mere management or supervision." *See, Federal Sentencing Guidelines Manual*, Section 3B1.1, Application Note 3 (Nov. 1990), reprinted in Appendix hereto, at App. 38. Notably, however, the trial court in the instant case wholly failed to consider even one of the factors listed in imposing the maximum increase. Indeed, no evidence was introduced to establish that Swanson had a significant role in the activities that formed the basis for the convictions in Counts I and III.

The trial court also failed to make any specific findings as to whether the criminal activity "involved five or more participants or was otherwise extensive." Section 3B1.1, Application Note 1, defines "participant" as "a person who is *criminally responsible* for the commission of the offense, but need not have been convicted." *See, Federal Sentencing Guidelines Manual*, Section 3B1.1, Application Note 1 (Nov. 1990), reprinted in Appendix hereto, at App. 38, (emphasis added). Courts have strictly construed the definition of "participant" in determining role in the offense. *See e.g., United States v. Carroll*, 893 F.2d 1502, 1511 (6th Cir. 1990); and *United States v. Fuller*, 897 F.2d 1217 (1st Cir. 1990). In the instant case, there was no finding that Swanson's criminal activity relating to Counts I and III involved any other persons criminally responsible for the conduct. Although the indictment identified Steven Brooks as a participant in the alleged offenses, no evidence was introduced, nor any findings made, concerning the role of any other participants involved in the shipping of any videotape, much less than transport of the single videotape determined to be obscene.

As noted in the commentary to Section 3B1.1 of the federal sentencing guidelines, "the section provides a range of adjustments to increase the offense level based upon the size of a criminal organization (i.e. the number of participants in the offense) and the degree to which the defendant was responsible for committing the offense." *See* Appendix, App. 38. Application of the *maximum* four level increase in the instant case is wholly contrary to the Sentencing Commission's intent where there was no extensive criminal organization involved in

the shipping of one obscene videocassette tape, and where the Petitioner had no responsibility for the commission of the offense other than holding a corporate title.

Based upon the division among the circuits concerning the interpretation of the term "offense" in determining whether an adjustment is appropriate for a defendant's role in the offense, and the lack of findings in the record to support a four level increase of Petitioner Swanson's offense level in the instant case, the within Petition should be granted by this Court.

IV.

A CORPORATE DEFENDANT'S CONVICTION FOR CONSPIRACY TO TRANSPORT OBSCENE MATERIAL THROUGH INTERSTATE COMMERCE CANNOT BE SUSTAINED WHERE THE SUBSTANTIVE COUNTS IN WHICH IT WAS CHARGED AND THE OVERT ACTS ALLEGED IN FURTHERANCE OF THE CONSPIRACY DID NOT INVOLVE OBSCENITY, BUT RATHER, ESTABLISHED ONLY AN AGREEMENT TO TRANSPORT CONSTITUTIONALLY PROTECTED SPEECH MATERIAL

The essence of conspiracy is an agreement to commit an illegal act. *See e.g., United States v. Coler*, 583 F.2d 1135 (8th Cir. 1978). Moreover, the general rule is that a conspirator is liable for the acts of his co-conspirators as long as he is a member of the conspiracy. *See e.g., United States v. Cimini*, 427 F.2d 129 (6th Cir.), *cert. den.*, 400 U.S. 911 (1970). However, this general rule "does not control when First Amendment rights are at stake." *United States v. Peraino*, 645 F.2d 548, 551 (6th Cir. 1981).

In most federal cases, such as those involving narcotics trafficking, kidnapping, bank robbery and other crimes persons may conspire to commit, the illegal purpose of the conspiracy will be illegal in every federal jurisdiction. However, it is impossible to conspire to violate the federal obscenity statutes without the existence of a specific *obscene* item to transport. Sexually explicit material is not illegal until it is proven obscene. *See e.g., Heller v. New York*, 413 U.S. 483 (1973); and *Roaden v. Kentucky*, 413 U.S. 496 (1973). As such, when the agreement alleged is one to distribute materials which constitute expression, the agreement may have both legal and illegal purposes depending on varying community standards. *United States v. Peraino, supra*, 645 F.2d, at p.551.

In the instant case, Petitioner General Video Midwest was charged and convicted, along with Petitioners ABC, Inc. and David Swanson, of conspiring to use a common carrier to transport obscene material in interstate commerce in violation of 18 U.S.C. Sections 371 and 1462. The only overt acts or "unlawful purpose" alleged in the instant case involved the three videotapes charged in the substantive counts of the indictment. However the jury concluded that the videotapes charged in two of three substantive counts of the indictment were not obscene and, therefore, cannot be illegal objectives of the conspiracy. While the jury found the videotape in the remaining substantive count to be obscene, General Video Midwest was not charged in that count of the indictment. Therefore, by the Government's own admission, as evidenced by its failure to charge General Video Midwest in that count, there was not sufficient evidence linking General Video Midwest to the single obscene videotape either by shipment or agreement. Con-

sequently, there was no showing of any illegal objective to the conspiracy either committed or agreed to by General Video Midwest.

Rather, the most the Government can prove in this case, absent a conviction of General Video Midwest on any substantive count (and absent a showing that General Video Midwest was involved in any illegal objective of the conspiracy such as those alleged in the overt acts of the conspiracy) is that certain persons conspired to ship sexually explicit material, which, in itself, is not a crime. Consequently, the Government failed to show that General Video Midwest agreed to do anything illegal. The videotapes alleged in the two substantive counts in which General Video Midwest was charged, and the overt acts alleged in the conspiracy count were not, in any way, shown to involve obscenity or General Video Midwest. Clearly, General Video Midwest was not involved with any videotapes found to be obscene, and any agreement entered into by General Video Midwest can only be considered an agreement to transport constitutionally protected speech material.

Moreover, the Eighth Circuit seemingly overlooks those few cases in which the combination of substantive obscenity offenses and conspiracy is alleged. In the majority of those cases, the defendants convicted of the conspiracy were also convicted of at least one substantive count. *See e.g., United States v. Cangiano*, 491 F.2d 906 (2nd Cir.) *cert. den.*, 419 U.S. 904 (1974); *United States v. Cohen*, 583 F.2d 1030 (8th Cir. 1978); *United States v. Marks*, 520 F.2d 913 (6th Cir.), *rev'd on other grounds*, 430 U.S. 188 (1977). *Cf., United States v. Friedman*, 506 F.2d 511 (8th Cir.), *cert. den.*, 423 U.S. 855 (1975). In the single case in which a conspiracy conviction was obtained without a conviction of an obscenity

count, the defendant conceded the materials involved were obscene and the ultimate issue in the case was whether the defendants were involved in the conspiracy. *United States v. Zuideveld*, 316 F.2d 873 (7th Cir.), *cert. den.*, 376 U.S. 916 (1964). "There need not be proof the conspirators were aware of the criminality of their objective, but *knowledge of the commission of the substantive offense must be brought home to them to supply the essential ingredient of intent.*" *Id.*, at 878 (emphasis added).

In the instant case, General Video Midwest was acquitted of all substantive offenses specified as overt acts in the conspiracy count. In addition, only the one videocassete tape was determined to be obscene. Based upon the evidence in this case, General Video Midwest had absolutely nothing to do with that particular videotape. It did not agree that the videotape be sent, nor did it take any steps in furtherance of a conspiracy with respect to the videotape.

Accordingly, the Eighth Circuit's affirmation of Petitioner General Video Midwest's conviction is contrary to the decisions of numerous other federal appellate courts and violative of Petitioner's First Amendment rights of freedom of speech. Therefore, the within Petition should be granted by this Court.

CONCLUSION

Rule 10 of the Supreme Court Rules states that review on a writ of certiorari will be granted only when "special and important reasons" to do so exist. One significant reason for granting certiorari pursuant to Supreme Court Rule 10.1(a) is when a federal appellate court has rendered a decision in conflict with the decisions of numerous other federal circuit courts of appeal on the same matter.

Based upon the foregoing arguments and authorities, the Eighth Circuit's decision in the instant case is in direct conflict with the decisions of numerous other federal courts, particularly with regard to those issues involving the applicability and statutory construction of various provisions of the federal sentencing guidelines. Because the conflicts among the circuits themselves perpetuate the very uncertainties and disparities in sentencing that the guidelines were designed to eliminate, Petitioners respectfully request this Court grant the within Petition for a Writ of Certiorari to review the Eighth Circuit's opinion in this case.

DATED: July 31, 1991

Respectfully submitted,

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91-210 (2)

Supreme Court, U.S.
FILED
AUG 1 1991
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

ABC, INC., d/b/a ABC BOOKS, INC.;
GENERAL VIDEO MIDWEST, INC.; and
DAVID SWANSON, Petitioners,

vs.

UNITED STATES OF AMERICA, Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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UNITED STATES COURT OF APPEALS
THE EIGHTH CIRCUIT

No. 90-1738NE

UNITED STATES OF AMERICA,

Appellee,

v.

ABC, INC., d/b/a ABC BOOKS, INC.;
GENERAL VIDEO MIDWEST, INC.;
DAVID SWANSON,

Appellants.

Appeal from the United States District Court
for the District of Nebraska

Submitted: December 13, 1990
Filed: April 26, 1991

Before LAY, Chief Judge, HEANEY, Senior Circuit Judge and WOLLMAN, Circuit Judge.

HEANEY, Senior Circuit Judge:

Defendants ABC, Inc., General Video Midwest, and David Swanson appeal from their convictions for violating federal obscenity law. We affirm.

A jury convicted each defendant of one count of conspiring to use a common carrier to transport obscene materials in interstate commerce in violation of 18 U.S.C. Sections 371 and 1462 and one count of using a common carrier to transport obscene materials in interstate commerce in violation of 18 U.S.C. Section 1462.[1] ABC was fined $120,000, and General Video Midwest was

fined $80,000. Swanson received twenty-four month concurrent sentences for each of the two counts of conviction and was fined $46,861.71.

On appeal, defendants raise numerous issues regarding their convictions, only one of which requires detailed discussion.[2] Defendants also attack the sentences imposed on them under the sentencing guidelines.

Defendants argue that the district court erred in instructing the jury that "patent offensiveness," which is necessary to satisfy one of the prongs of the *Miller* obscenity test,[3] is to be measured by what the adult community will accept. Defendants argue that the appropriate standard should be one of toleration, not acceptance. Accordingly, they submitted the following jury instruction:

> The second prong to be applied [under *Miller*] in determining whether a film is obscene, is whether it depicts or describes sexual conduct in a patently offensive way .... In making this judgment you must measure whether the material is patently offensive by contemporary community standards; that is, *whether it so exceeds the limits of what the adult community will tolerate as to be clearly offensive* [Emphasis added].

The trial court rejected defendants' proposed instruction and replaced the emphasized language with the following standard:

> whether it so exceeds the limits of what the adult community will *accept* as to be clearly offensive [Emphasis added].

Defendants claim that this instruction violates established case law. We disagree.

Defendants cite *Smith v. United States*, 431 U.S. 291 (1977), for the proposition "that contemporary community standards must be applied by juries in accordance with their own understanding of the tolerance of the average person in their community ...." *Id.* at 305. Defendants argue that this language establishes a tolerance standard for determining patent offensiveness. Defendants fail to note, however, that in *Smith* "[t]he [district] court instructed the jury that contemporary community standards were set by what is in fact *accepted* in the community as a whole." *Id.* at 297-98 (emphasis added).

The Supreme Court affirmed the conviction in *Smith* and thus implicitly approved the use of an acceptance standard. We therefore cannot read *Smith* to require a tolerance standard. Indeed, our review of Supreme Court and Eighth Circuit opinions confirms that the district court's instruction was appropriate in this case. The Supreme Court has used the words "accept" and "tolerate" interchangeably. *See e.g. Miller v. California*, 413 U.S. at 32 ("It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City."). This court has similarly ruled that no error appeared in instructions using an acceptance rather than a tolerance standard. *See United States v. Cohen*, 583 F.2d 1030, 1043 (8th Cir. 1978); *see also United States v. Easley*, 927 F.2d 1442 (8th Cir. 1991) (concluding that the district court did not err in instructing jury under acceptance rather than tolerance standard). Based on this case law, we cannot rule that the district court erred in this case by instructing the jury under an acceptance standard.

Defendants also raise several sentencing guidelines issues. They first contend that the guidelines do not apply to them. The only two overt acts in furtherance of the conspiracy alleged to have taken place after the guidelines took effect on November 1, 1987 were those acts which served as the basis for the substantive offenses charged in Count IV of the indictment. Because each defendant was found not guilty of the acts charged in this count, defendants believe that the jury found the conspiracy for which defendants were judged guilty to have terminated before November 1, 1987. Defendants were convicted, however, of Count I of the indictment, which expressly charged that the conspiracy continued until May 12, 1988. We therefore do not find the defendants' argument persuasive. Accordingly, we affirm the district court's conclusion that the sentencing guidelines apply to the defendants.

Defendant Swanson next argues that the trial court erred in increasing his guideline range by two levels for obstruction of justice under guidelines section 3C1.1. At the time of his arrest and throughout the ensuing prosecution, Swanson used his alias, "David Swanson," rather than his birth name, "Michael Elmer Mohapp." The district court reasoned that this use of an alias warranted a two-level enhancement for obstructing justice and increased Swanson's offense level from 15 to 17. This enhancement increased Swanson's sentencing range from 18-24 months to 24-30 months. The court then sentenced Swanson to 24 months imprisonment.

Because the sentence of 24 months is within both guideline ranges, it would be permissible even if Swanson's contention with respect to the two-level enhancement were correct. Swanson's sentence therefore is not appealable. *See United States v. Hoelscher*, 914 F.2d 1527, 1537 (8th Cir. 1990).[4]

Swanson also contends that the district court erred in applying a four-level enhancement for his leadership role in the offense. This increase resulted from Swanson's position as president of both ABC, Inc. and General Video Midwest. Section 3B1.1 of the guidelines permits a four-level increase "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." Because Swanson was an active president of the defendant companies, we are satisfied that the district court did not err in increasing Swanson's guidelines range for his leadership role.

For the foregoing reasons, we affirm the convictions and sentences of each of the defendants.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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1 The trial court later set aside General Video Midwest's conviction under the second count since this company was not charged in that count.

2 The defendants also contend that (1) insufficient evidence supported their convictions, (2) the trial court erred in prohibiting certain evidence from being introduced at trial, and (3) the trial court improperly instructed the jury regarding various aspects of the *Miller v. California*, 413 U.S. 15 (1973), standards for determining whether a material is obscene. After reviewing the record, we conclude that the district court did not commit reversible error with respect to these issues.

3 *Miller v. California*, 413 U.S. 15 (1973), established the reigning three-prong test for determining obscenity.

4 We note, however, that the United States Sentencing Commission recently announced that "providing a false name or identification document at arrest, except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense" does not warrant an enhancement for obstruction of justice. United States Sentencing Commission, *Guidelines Manual*, Section 3C1.1 Application Note 4(a) (Nov. 1990). This commentary contradicts this circuit's holding in *United States v. Blackman*, 904 F.2d 1250 (8th Cir. 1990).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff,
vs. CR 89-L-05
ABC, INC., d/b/a ABC BOOKS, INC.;
GENERAL VIDEO MIDWEST, INC.;
and DAVID SWANSON, Defendants.

MEMORANDUM AND ORDER DENYING RENEWAL OF MOTION FOR JUDGMENT OF ACQUITTAL

I have reviewed the evidence and find that it was sufficient to submit Counts I and III of the indictment to the jury.

1. The fact that the jury's verdict acquitted the defendants on Counts II and IV but found the defendants guilty on Counts I and III does not mean that the verdict was inconsistent with the facts, the law, or the instructions.

2. The court's instructions to the jury, insofar as they were objected to by the defendants, were not incorrect.

3. The motion picture film on video tape, "Perfect 10," cannot be said to be not obscene as a matter of law.

4. It is not necessary for the defendants to be acquitted on Count I alleging a conspiracy if the defendants were acquitted of all substantive counts.

IT THEREFORE IS ORDERED that the renewed motion for judgment of acquittal, filing 87, is denied.

Dated January 30, 1990.

BY THE COURT

/s/ Warren K. Urbom

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,
Plaintiff,

vs. CR 89-L-05

ABC, INC., etc., et al.,
Defendants.

MEMORANDUM AND ORDER ON DEFENDANT GENERAL VIDEO MIDWEST'S MOTION TO SET ASIDE CONVICTION ON COUNTS I AND III OF THE INDICTMENT

REGARDING COUNT III

Apparently escaping everyone's attention at the trial was the fact that the defendant General Video Midwest, Inc. was not indicted in Count III. Hence, it is obvious that it cannot be convicted on that count. The government agrees that the conviction on the count must be set aside, and it will be.

REGARDING COUNT I

General Video was found not guilty on substantive Counts II and IV and was not indicted on Count III. General Video now takes the position that inasmuch as it is not guilty of any substantive count, it cannot be found guilty of conspiracy under Count I. I conclude that it is mistaken in that position.

In *United States v. Friedman*, 506 F.2d 511 (8th Cir. 1974), an obscenity case, the substantive counts against the defendant Friedman were dismissed during the trial but Friedman was found guilty of the conspiracy count. The conviction was upheld on appeal, the court observing:

> . . . The commission of a substantive offensive and a conspiracy to commit it are separate and distinct offenses. *Pinkerton v. United States*, . . . [328 U.S. 640, 643 (1946)]. . . .Thus the dismissal of substantive counts against defendant Friedman does not bar prosecution for conspiracy to violate the substantive offense.

The requirements for convicting one of conspiracy are well settled. In *United States v. Cohen*, 583 F.2d 1030 (8th Cir. 1978) the court lists them as follows:

> ". . . (1) an agreement, (2) a combination of two or more persons, (3) an unlawful purpose, and (4) that at least one of the conspirators committed an overt act in furtherance of the conspiracy."

Although the defendant General Video asserts in its brief that "the only overt acts, or 'unlawful purpose' alleged involved the three films charged in Counts II, III and IV of the indictment," the assertion is not accurate. Nine overt acts are alleged in the indictment, the first being that:

> On or about April 30, 1987, DAVID SWANSON was at the Adult Bookstore and Cinemax, 921 O Street, Lincoln, Nebraska, performing supervisory activities.

The overt act was clearly supported by the evidence at the trial.

Doing of an overt act by the defendant General Video is not necessary, as long as one of the conspirators did it.

Neither is it necessary that an overt act pertain directly to an obscene film, but even if it were necessary, the evidence here amply supports to doing of overt acts 5, 6 and 7, having to do with "Perfect 10," a film found by the jury in its decisions on Count III to have been obscene.

IT IS ORDERED that:

1. the conviction of the defendant General Video Midwest, Inc. on Count III of the indictment is set aside; and

2. the motion of the defendant General Video Midwest, Inc. to set aside conviction on Counts I and III of the indictment, filing 88, is otherwise denied.

Dated February 5, 1990.
(Filed February 6, 1990)

BY THE COURT
/s/ Warren K. Urbom

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,
Plaintiff,

vs. CR 89-L-05

ABC, INC., etc., et al.,
Defendants.

TRANSCRIPT OF SENTENCINGS

Proceedings had before the Honorable Warren K. Urbom, United States District Judge, on April 27, 1990, in Lincoln, Nebraska.

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THE COURT: Let's take ABC then since it was named first in the indictment, I believe ....

* * * *

MR. KLUENDER: Your Honor, for purposes of the hearing today, it may be easier to reference the paragraphs in the tentative findings and pose our objections to them in that manner ....

We would also object to the next paragraph, which would be the 7th paragraph, of the tentative findings concerning the application of the guidelines to the offense of conviction, and we reiterate our objection on the basis that the substantive offense in relation to the one film that was found to be obscene by the jury, everything occurred prior to the guidelines effective date concerning that film and that any conspiracy that might have existed after that date did not relate to that film and should not be used to enhance the base level.

THE COURT: All right, the objections are overruled ....

* * * *

MR. GILLESPIE: Terrence [sic] Gillespie on behalf of General Video. Your Honor, I submitted in writing our objections to presentence investigation. Your Honor has dealt with them in tentative findings. I reassert the same objections ....

* * * *

THE COURT: Very well, the objections are overruled ....

* * * *

THE COURT: All right, this is the matter of United States against David Swanson, which is in the same case as the one we've previously heard today, CR89-L-05 ....

* * * *

MR. SCHWARTZ: If Your Honor please, we objected to the presentence report and set out in detail the nature of our objections. To rehash them, other than for the record, really makes no sense, but we will simply stand on those written objections as we set them forth and, in addition, the objections to the tentative findings that we subsequently filed with the court. It's our position, and just by way of clarifying, the Court made a statement that while we objected to certain paragraphs, we objected to them because they were irrelevant but not necessarily untrue. I'm not exactly sure what those paragraphs allude to but I do know this, that this defendant has no connection, I think he's prepared to advise the court of that, with Reuben Sturman .... There were witnesses called concerning General Video Midwest, concerning Midwest Bookkeeping and/or Capitol News. Those witnesses testified concerning the owners of that company, a Paula Lawrence .... But to clarify the position insofar as my knowledge of his dealings with Paula Lawrence, if one was to take the position well, Paula Lawrence was associated with Reuben Sturman and he worked for that company and therefore because of that he could be sent [sic], I suppose you could bootstrap that type of argument, but the claim that he's a right-hand man of Reuben Sturman or so he was associated with him in business dealings or that he did dealings with Sturman or that he in any way assisted Sturman, that is false. We would say that, based upon all of the knowledge that we have, he just isn't that type of an individual who's high enough up in the hierachy [sic] of things to

be—in the first place, to have any association with him. I think it's safe to say he probably has met him, I think he would recognize him if he saw him, but I doubt seriously that he had any involvement, so to that end we object to that portion of it, Your Honor.

Insofar as the matters involving obstruction of justice, I must tell the Court I've checked the law as the Court interprets the law to be, and I can understand the Court's rulings that he obstructed justice when he gave an incorrect name and instead of Mr. Mohab [sic] gave the name of Swanson. I would like to address that at the time or, if the Court wants to hear it now, I am prepared to talk about it now.

* * * *

THE COURT: All right. These will be my rulings: The objections are overruled, the tentative findings—the final findings that I now make in accordance with the tentative findings. What I do say is that with respect to the matters relating to Reuben Sturman, seems to me that the evidence is sufficient to indicate that there is a degree of connection all right between Mr. Swanson and Reuben Sturman. The degree of connection is hazy. Paragraph 34 of the pretrial—presentence report says that information contained in the files of the United States Attorney's office has revealed that the defendant is a high ranking employee in [sic] Reuben Sturman, who has been described as the biggest, most powerful distributor of pornography in the United States, perhaps the world. But there is little in that or in later statements that gives me much clue as to what Mr. Swanson's actual role is in the enterprises of Mr. Sturman. And, accordingly, it is a matter of not irrelevant importance, but of not major importance either, because none of the information tells me that Mr. Swanson is some sort of

kingpen in [sic] Mr. Sturman's operation, but there is a connection.

All right, the offense level I find to be 17, criminal history category is one. I leave open at this moment whether a departure is to be made. I left that open at the time I made tentative findings.

All right, now let me hear from counsel on the subject of sentence. Mr. Schwartz, I'll call first upon you.

MR. SCHWARTZ: Thank you, Your Honor ....

What bothers me is where in these guidelines are we precluded from looking at this defendant and looking at his problems? Because he's had a history of problems. No one changes his name from Elmer Mohab [sic] to David Swanson for reasons, other than he just doesn't like his name, unless there's deep reasons for it. You have Mr. Swanson who went to Vietnam, he went there voluntarily, he went through the fire and the hell that took place over there, and he carries with him those scars, both and on his body and on his psyche, his mind. I mentioned to the Court, and the Court has no way of knowing about it, but Mr. Gillespie, who's one of the attorneys in this case, was also in Vietnam, and it was amazing that these two men who sat down and exchanged words for just but a few minutes were hugging each other and going through these experiences and reliving these experiences that they as men lived. Where does the guideline say that you can't consider these things as they occurred, what they did and the problems that they've encountered? ....

And so what we're asking, Your Honor, there's nothing in there, in these guidelines that take away a court's heart or takes away from the Court the compassion or takes away from the Court the ability to say that

these guidelines have to bend in certain circumstances, and who looks at this crime, which we don't say is not a serious crime, because it is, but it is a motion picture and it is a battle over thought and it is a battle in speech which some people say has created a pox upon society and others take the position it's firming up the right of expression, so that it can't be trampled upon another day, another time, another place over the material, and having then weighed these things on the scale, can this Court not find sufficient reason to depart from these guidelines which come up with this guideline level of 17, and reduce it to a level that certainly puts them on par with other individuals who have been charged and convicted of crimes who were in fact the true owners and the true operators of the businesses.

Now, insofar as Swanson and the fact that he's a president of these companies, we can only tell the Court this: That he's not an owner, he's not a stockholder, he never was an owner nor was he ever a stockholder. He never gained any benefit from the making of money by these companies, which surely they make, and nor did he gain anything by way of commissions or additional benefits for what he did, nor was he ever paid for being a president of a company. He's a figure head that was put there by others, used by others, and when the time came, and I found out that he was an officer of these companies and discussed it with him, he said that when he was fired, he told them to remove his name, that they—he didn't want his name on these things because he was aware of what could come down and, in fact, did come down, they then took steps to take his name off, but to tell this Court that he's off, though, this day, I truthfully don't know. They tell me he is, but I don't know, and I don't want to represent that.

* * * *

THE COURT: All right, sir. Mr. Everett?

MR. EVERETT: Your Honor, I know I've seen the information but I don't remember exactly how long ago it was that Mr. Swanson was in Vietnam, but it was 15 or 20 years or maybe even more ago. At some point in time that ceases to become an excuse, ceases to become adequate justification for your acts, it ceases to be an entitlement to get out of jail free card, I guess is what's being sought here. It asserted that it caused—that his experiences in Vietnam caused problems, and it's undeniable that the Vietnam experience has caused a lot of people problems, that's been well-documented, and I don't think it's been documented here. Mr. Swanson, through his attorney, makes the same claim that many other people who were in Vietnam make, but offers no supportive documentation, no substance behind the claim. You have to wonder if he isn't trying to benefit here from others' honestly experienced misfortunes.

Certainly none of these problems, there was no defense raised in this case that there were any problems that rose to the level of interfering with mental processes that would support a defense to the charges here, nor was it asserted by Mr. Swanson as a defense in this case. He was under no obligation to do so. But he didn't defend himself on the grounds that he wasn't an owner or a stockholder, as is now being asserted. And that gets to part of the problem here. How do we know? It sounds like Mr Schwartz, in all honesty, admits that he doesn't really know what Mr. Swanson's status is with this company. And that's part of the problem that we've experienced throughout this presentence investigation process, is that all three of the defendants seem to be playing hide the ball and conceal the information with the Court.

And I know that's taken into consideration in the obstruction of justice enhancement.

He was, at the very least, an organizer, a person who was in charge of a number of other individuals. He made his living doing what he was doing. He did profit from these activities, he did benefit from these activities, and he assisted others in doing so ....

THE COURT: Anything else, Mr. Schwartz?

MR. SCHWARTZ: Just one thing, Your Honor. I think counsel misconstrued my statement concerning I don't know or can't vouch for Swanson. I can vouch for Mr. Swanson that as far as he's concerned has nothing to do with these companies, nor is he a stockholder nor an owner nor was he ever any of those. I can't vouch for the fact that they told me that they'd removed his name from these companies because I can't speak for them, that's all.

THE COURT: I understand. I've already made a statement that Mr. Schwartz wasn't here to hear, but with respect to the other two defendants I did respond to the general idea of whether obscenity ought to be considered to be some serious or major crime or very minor crime, and I'll not repeat that. It is applicable here. Mr. Swanson was here when I said it and so I'm not saying—not leaving out anything that he hasn't already heard. I simply don't see any point in repeating it.

I acknowledge that there is quite a difference of feeling about how Mr. Swanson fits into the scheme of things as to his relationship with other persons who are in the business of distributing x-rated films. It's obvious that the government wants me to consider that to be an important feature. It's obvious that the defense wants

me to not to consider it at all. In that respect, I think I must take a middle ground. I'm not going to hold Mr. Swanson's feet to the fire as being a right-hand man of Mr. Sturman. I've indicated that already. But I—when I look at the evidence that's before me I have to consider that there is a relationship that he can't duck. Whether he has not been, insofar as the companies that are on trial here, have been on trial here, whether he has been stockholder or an owner, I can say from the evidence that he has been the president, and the general nature of the defendants to provide scant information has to leave me with some sense of discontent in being able to credit Mr. Swanson with all he should like me to credit him with.

So far as the Vietnam scars are concerned, all I really know through the process that has been set up for gaining information that's been going on for months now, is the one paragraph in the presentence report, paragraph 107. All the rest that I've heard is simply that, it's Mr. Schwartz telling me what he thinks the facts are, but there is no—there's nothing in the presentence report that anybody has reported to the presentence report writer, as far as I know, in the whole lengthy process. This is what it says: "Investigation by this officer in view of the defendant under his legal name, Michael Elmer Mohab [sic], was enlisted in the United States Army from January 23, 1968, until receiving an other than honorable discharge on January 3, 1978. Records indicate the defendant served in Vietnam. He was discharged due to desertion and records will show that at the time of discharge the defendant was 2,947 days AWOL. They also reflect that the defendant received three Article 15's, a summary court marshal and special court marshal, all for AWOL. In October, 1969, the defendant was sentenced by military court to serve six

months at Fort Leavenworth disciplinary barracks and subsequent to that sentence the defendant disappeared and failed to return for service of sentence."

Now, I don't know whether Mr. Swanson has scars from service in Vietnam or not. What I've read is the factual statement that appears in the records, and I'm loathe to now at this late date, Mr. Schwartz, depend upon statements from you, not that I discount what your honesty in saying them is, it's simply that we've set up a process for developing the facts and that process hasn't developed any facts until now, whether you make a statement, and I think I have to stick with what has been spread across the horizon to all counsel to study, to all parties to study, and then if they have additional information or objections to make, to make it so that all will be involved in the process, and I simply haven't seen anything other than what I read as fitting into that process.

There is a question whether I should depart upward because of some features such as Mr. Swanson's long-term involvement in distribution of materials which may or may not be pornography or obscenity, but I don't consider that in itself as being sufficient to depart upward. He has furnished material falsehoods to the probation officer during the course of the pretrial services interview, and the presentence interview he concealed his true identity, provided a false date of birth, false social security number, false information relative to his family background, his educational background, military background and his prior record. That has to count against him. He was arrested on charges of driving while intoxicated while on bond in this case.

I suspect that that might warrant an upward departure from the guideline range but I choose not to depart

upward. The guideline range is 24 to 30 months. Request has been that I depart downward, and I suppose I need to comment a bit about that. I can't rely upon his Vietnam experience as a reason for departing downward. It's not improper to look at sentences that other persons have received, and is proper to look at sentences that other people have received for other offenses, and as far as I know, as far as I can tell, sentencings have not generally been as high as the top of that range of 30 months. The guidelines, the sentencing commission has taken the position that its guideline ranges are, by and large, a kind of average of what judges have sentenced, and I don't have any way of checking that out. I don't know, when Mr. Schwartz says it's not been his experience that they run that high, and whether the sentencing commission means by that that when you make such enhancements as are found at a particular case you still come out with approximately an average of sentences for like situation, I don't know. It is necessary, as I read the guidelines, for me to find some good reason for departing downward, just as I ought to find a good reason for departing upward, if I were to depart upward. And I need to find that there's some factor that has not been adequately taken into account by the sentencing commission in order to depart downward. I don't see anything in this case that I could identify as being a factor that the sentencing commission has not adequately taken into account to depart downward or to depart upward; hence, I shall not do so.

The findings that I made, then, now as findings I've already indicated, I believe, are in accordance with the tentative findings, except that I did not decide whether there was to be a departure upward or downward. I now conclude that there should not be.

* * * *

MR. SCHWARTZ: The only thing we'd like to once again call the Court's attention to, and I guess by way of establishing it, I don't think I can do any better job than anyone else, I know the Court takes the position that in arriving at guidelines there was an evaluation of cases as to what the sentences fit within those—those crimes prior to the guidelines. Problem is that there's no problem showing, and I don't believe at the time the government promulgated the guidelines that they took into consideration or refused to take into consideration certain activities which are more heinous and in which the Court steadfastly imposed far more strict sentences, those involving beastiality, child pornography and the like. This is absent from that, yet the defendant finds himself falling within a guideline that takes that, I believe, into consideration. Because of that, Your Honor, because I can only tell the Court based upon my personal experiences, which include not only cases that I've been involved in, but all the research that I've done, 30 months is the most unusual sentence, so we'd urge the Court to reconsider and depart downward from that sentence at this time

THE COURT: I agree that this case does not involve that extreme kind of pornography. I agree with that, and my inclination is to pay attention to what you've said, and I shall change my mind and make it 24 months, but I shall not depart more than that. It will be 24 months instead of 30. All right, that will be the sentence then as I indicated tentatively it would be, but now final, but it will be 24 months rather than 30. All right.

* * * *

C-E-R-T-I-F-I-C-A-T-E

I, Paula J. Kort, certify that the foregoing is a correct transcript from the proceedings held in the above-entitled matter.

/s/ Paula J. Kort	6/25/90
Official Court Reporter	Date

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,
Plaintiff,

vs. CR 89-L-05(01)

ABC, INC., d/b/a ABC BOOKS, INC.,;
Defendant.

JUDGMENT
UNDER SENTENCING REFORM ACT OF 1984

On April 27, 1990, in the presence of the attorney for the government, the defendant appeared in person with counsel, Douglas L. Kluender.

DEFENDANT was found guilty on Counts I and III after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such counts, which involve the following offenses:

Title & Section	*Nature of Offense*	*Count Number*
18 USC 371	Conspiracy to transport obscene material in interstate commerce	I
18 USC 1462	Use of common carrier in interstate commerce to transport obscene material	III

The defendant has been found not guilty on Counts II and IV and is discharged as to such counts.

IT IS ORDERED that the defendant shall pay to the United States a fine in the sum of $60,000.00 as to each of Counts I and III, for a total of $120,000.00.

IT IS FURTHER ORDERED that the defendant shall pay to the United States a special monetary assessment as required by 18 USC 3013 in the amount of $200.00 as to each of Counts I and II, for a total of $400.00, and ⅓ of the taxable costs of prosecution.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc.Sec.Number:
363-18-9864

Defendant's mailing address:
921 O St., Lincoln, NE 68508

DATED: April 27, 1990
(FILED: April 30, 1990)

BY THE COURT

/s/

Warren K. Urbom
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,
Plaintiff,

vs. CR 89-L-05(02)

GENERAL VIDEO MIDWEST, INC.;
Defendant.

JUDGMENT
UNDER SENTENCING REFORM ACT OF 1984

On April 27, 1990, in the presence of the attorney for the government, the defendant appeared in person with counsel, Terence P. Gillespie and Douglas L. Kluender.

DEFENDANT was found guilty on Counts I and III after a plea of not guilty. On February 6, 1990, the court set aside the conviction as to Count III.

Accordingly, the defendant is adjudged guilty of Count I which involves the following offenses:

Title & Section	*Nature of Offense*	*Count Number*
18 USC 371	Conspiracy to transport obscene material in interstate commerce	I

The defendant has been found not guilty on Counts II and IV and is discharged as to such counts.

IT IS ORDERED that the defendant shall pay to the United States a fine in the sum of $80,000.00.

IT IS FURTHER ORDERED that the defendant shall pay to the United States a special monetary assessment as required by 18 USC 3013 in the amount of $200.00 and ⅓ of the taxable costs of prosecution.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc.Sec.Number:

Defendant's mailing address:
c/o Terence P. Gillespie,
Suite 1420, 53 West Jackson Blvd.
Chicago, IL 60604

DATED: April 27, 1990
(FILED: April 30, 1990)
BY THE COURT

/s/
Warren K. Urbom
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,
Plaintiff,

vs. CR 89-L-05(03)

DAVID SWANSON,
Defendant.

JUDGMENT AND COMMITMENT ORDER UNDER SENTENCING REFORM ACT OF 1984

On April 27, 1990, in the presence of the attorney for the government, the defendant appeared in person with counsel, Arthur M. Schwartz and Douglas L. Kluender.

DEFENDANT was found guilty on Counts I and III after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such counts, which involve the following offenses:

Title & Section	*Nature of Offense*	*Count Number*
18 USC 371	Conspiracy to transport obscene material in interstate commerce	I
18 USC 1462	Use of common carrier in interstate commerce to transport obscene material	III

The defendant has been found not guilty on Counts II and IV and is discharged as to such counts.

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of twenty-four (24) months as to each of Counts I and III, concurrent.

Execution of the sentence of imprisonment is suspended pending appeal of this matter to the United States Court of Appeals for the Eighth Circuit.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years under 18 USC 3583.

While on supervised release, the defendant shall comply with the standard conditions that have been adopted by this court as follows:

STANDARD CONDITIONS OF SUPERVISED RELEASE

While the defendant is on probation or supervised release pursuant to this Judgment, defendant:

1. Shall not commit another federal, state or local crime;
2. shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;
3. shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
4. shall answer truthfully to any inquiries by the probation officer and follow the instructions of the probation officer;

5. shall support his or her dependents and meet other family responsibilities;

6. shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7. shall notify the probation officer prior to any change in residence or employment;

8. shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court;

9. shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. shall permit a probation officer to visit at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12. shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the court;

13. shall, as directed by the probation officer, notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notification and to confirm the defendant's compliance with such notification requirement;

14. shall not possess or control any firearms or ammunition.

Defendant shall comply with the following additional conditions:

SPECIAL CONDITIONS OF SUPERVISED RELEASE

1. Defendant shall not use or possess alcoholic beverages or controlled substances during the entire period of supervised release except those medicines prescribed by a physician.

2. Defendant shall submit to chemical testing at the request of the supervising probation officer to detect the presence of alcohol or controlled substance in the defendant's body fluid.

3. Defendant shall attend and successfully complete any counseling, treatment or evaluation for alcohol abuse as deemed appropriate by the supervising probation officer.

4. Defendant shall pay to the United States a fine in the sum of $46,861.71.

5. Defendant shall pay ⅓ of the taxable costs of prosecution.

FINE

IT IS FURTHER ORDERED that the defendant shall pay to the United States a fine in the sum of $46,861.71.

IT IS FURTHER ORDERED that the defendant shall pay to the United States a special assessment as required by 18 USC 3013 in the amount of $50.00 as to each count, for a total of $100.00.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessment imposed by this Judgment are fully paid.

Defendant's Soc.Sec.Number	Defendant's mailing address:
390-62-2829	
388-52-7622 (in the name of Michael Elmer Mohapp)	28032 Grassy Way Escondido, CA 92026

DATED: April 27, 1990
(FILED: April 30, 1990)

/s/
Warren K. Urbom
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-1738NE

UNITED STATES OF AMERICA,

Appellee,

v.

ABC, INC., d/b/a ABC BOOKS, INC.;
GENERAL VIDEO MIDWEST, INC.;
DAVID SWANSON,

Appellants.

ORDER DENYING PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

Appellants' suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

June 3, 1991

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-1738NE

UNITED STATES OF AMERICA,

Appellee,

v.

ABC, INC., d/b/a ABC BOOKS, INC.;
GENERAL VIDEO MIDWEST, INC.;
DAVID SWANSON,

Appellants.

Appeal from the United States District Court
for the District of Nebraska

ORDER

Appellant's motion to stay the mandate of this court is granted pending the filing of a petition for writ of certiorari with the United States Supreme Court.

The issuance of the mandate in this case shall be stayed to and including July 18, 1991. If within that time there is filed with the Clerk of this court a certificate of notification by the Clerk of the Supreme Court that a petition for writ of certiorari has been filed, this stay shall continue until final disposition of the case by that court.

June 18, 1991

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-1738NE

UNITED STATES OF AMERICA,

Appellee,

v.

ABC, INC., d/b/a ABC BOOKS, INC.;
GENERAL VIDEO MIDWEST, INC.;
DAVID SWANSON,

Appellants.

Appeal from the United States District Court
for the District of Nebraska

ORDER

Appellants' motion to extend the stay of mandate pending the filing of a petition for writ of certiorari with the United States Supreme Court in this case is granted to and including August 1, 1991. If within that time there is filed with the Clerk of this court a certificate of notification by the Clerk of the Supreme Court that a petition for writ of certiorari has been filed, this stay shall continue until final disposition of the case by that court.

July 16, 1991

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

TITLE 18 U.S.C. SECTION 371

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

TITLE 18 U.S.C. SECTION 1462

Importation or transportation of obscene matters

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate of foreign commerce—

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion picture, film, paper, letter, writing, print or other matter of indecent character; . . .

Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

Section 2G3.1. *Importing, Mailing, or Transporting Obscene Matter*

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the offense involved an act related to distribution for pecuniary gain, increase by the number of levels from the table of Section 2F1.1 corresponding to the retail value of the material, but in no event by less than 5 levels.

(2) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.

(c) Cross Reference

(1) If the offense involved transporting, distributing, receiving, possessing, or advertising to receive material involving the sexual exploitation of a minor, apply Section 2G2.2 (Transporting, Receiving, or Trafficking in Material Involving the Sexual Exploitation of a Minor).

Commentary

Statutory Provisions: 18 U.S.C. Sections 1460-1463, 1465-1466. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Note:

1. "Act related to distribution," as used in this guideline, is to be construed broadly and includes production, transportation, and possession with intent to distribute.

Background: Most federal prosecutions for offenses covered in this guideline are directed to offenses involving distribution for pecuniary gain. Consequently, the offense level under this section generally will be at least 11.

Historical Note: **Effective November 1, 1987. Amended effective November 1, 1989 (*see* Appendix C, amendment 163); November 1, 1990 (*see* Appendix C, amendment 326).**

(1988-1990 Amendments)

163. The commentary to Section 2G3.1 captioned "Statutory Provisions" is amended by deleting "Sections 1461-1465" and inserting in lieu thereof "Sections 1460-1463, 1465-1466."

The purposes of this amendment are to conform the Statutory Provisions to the revision of Section 2G3.2 and to make them more comprehensive. **The effective date of this amendment is November 1, 1989.**

326. Section 2G3.1(b)(2) is amended by deleting "sadomasochistic" and inserting in lieu thereof "sadistic or masochistic."

Section 2G3.1(c) is amended by deleting:

(1) If the offense involved a criminal enterprise, apply the appropriate guideline from Chapter Two, Part E (Offenses Involving Criminal Enterprises and Racketeering) if the resulting offense level is greater than that determined above,

and inserting in lieu thereof:

(1) If the offense involved transporting, distributing, receiving, possessing, or adver-

tising to receive material involving the sexual exploitation of a minor, apply Section 2G2.2 (Transporting, Receiving, or Trafficking in Material Involving the Sexual Exploitation of a Minor).

This amendment inserts a cross reference to Section 2G2.2 for offenses involving materials which, in fact, depict children to ensure that the penalties for such offenses adequately reflect their seriousness. The current cross reference at subsection (c)(1) is deleted. In addition, the amendment conforms the terminology of specific offense characteristic (b)(2) to that used in other offense guidelines. **The effective date of this amendment is November 1, 1990.**

FEDERAL SENTENCING GUIDELINES MANUAL

Section 3B1.1. *Aggravating Role*

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

Commentary

Application Notes:

1. A "participant" is a person who is criminally responsible for the commission of the offense, but need not have been convicted.

2. In assessing whether an organization is "otherwise extensive," all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive.

3. In distinguishing a leadership and organization role from one of mere management or supervision, titles such as "kingpin" or "boss" are not controlling. Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. This adjustment does not apply to a defendant who merely suggests committing the offense.

Background: This section provides a range of adjustments to increase the offense level based upon the size of a criminal organization (*i.e.* the number of participants in the offense) and the degree to which the defendant was responsible for committing the offense. This adjust-

ment is included primarily because of concerns about relative responsibility. However, it is also likely that persons who exercise a supervisory or managerial role in the commission of an offense tend to profit more from it and present a greater danger to the public and/or are more likely to recidivate. The Commission's intent is that this adjustment should increase with both the size of the organization and the degree of the defendant's responsibility.

In relatively small criminal enterprises that are not otherwise to be considered as extensive in scope or in planning or preparation, the distinction between organization and leadership, and that of management or supervision, is of less significance than in larger enterprises that tend to have clearly delineated divisions of responsibility. This is reflected in the inclusiveness of Section 3B1.1(c).

Historical Note: Effective November 1, 1987.

FEDERAL SENTENCING GUIDELINES MANUAL

Section 3C1.1. *Obstructing or Impeding the Administration of Justice*

If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

Commentary

Application Notes:

1. This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt (other than a denial of guilt

under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision. In applying this provision, the defendant's testimony and statements should be evaluated in a light most favorable to the defendant.

2. Obstructive conduct can vary widely in nature, degree of planning and seriousness. Application note 3 sets forth examples of the types of conduct to which this enhancement is intended to apply. Application Note 4 sets forth examples of less serious forms of conduct to which this enhancement is not intended to apply, but that ordinarily can appropriately be sanctioned by the determination of the particular sentence within the otherwise applicable guideline range. Although the conduct to which this enhancement applies is not subject to precise definition, comparison of the examples set forth in Application Notes 3 and 4 should assist the court in determining whether application of this enhancement is warranted in a particular case.

3. The following is a non-exhaustive list of examples of the types of conduct to which this enhancement applies:

   (a) threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;

   (b) committing, suborning, or attempting to suborn perjury;

   (c) producing or attempting to produce a false, altered, or counterfeit document or record dur-

ing an official investigation or judicial proceeding;

(d) destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (*e.g.*, shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to do so; however, if such conduct occurred contemporaneously with arrest (*e.g.*, attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender;

(e) escaping or attempting to escape from custody before trial or sentencing; or willfully failing to appear, as ordered, for a judicial proceeding;

(f) providing materially false information to a judge or magistrate;

(g) providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense;

(h) providing materially false information to a probation officer in respect to a presentence or other investigation for the court;

(i) conduct prohibited by 18 U.S.C. Sections 1501-1516.

This adjustment also applies to any other obstructive conduct in respect to the official investigation, prosecution, or sentencing of the instant offense where there is a separate count of conviction for such conduct.

4. The following is a non-exhaustive list of examples of the types of conduct that, absent a separate count of conviction for such conduct, do not warrant application of this enhancement, but ordinarily can appropriately be sanctioned by the determination of the particular sentence within the otherwise applicable guideline range:

(a) providing a false name or identification document at arrest, except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense;

(b) making false statements, not under oath, to law enforcement officers, unless Application Note 3(g) above applies;

(c) providing incomplete or misleading information, not amounting to a material falsehood, in respect to a presentence investigation;

(d) avoiding or fleeing from arrest (*see, however,* Section 3C1.2 (Reckless Endangerment During Flight)).

5. "Material" evidence, fact, statement, or information, as used in this section, means evidence, fact, statement or information that, if believed, would tend to influence or affect the issue under determination.

6. Where the defendant is convicted for an offense covered by Section 2J1.1 (Contempt), Section 2J1.2 (Obstruction of Justice), Section 2J1.3 (Perjury or Subornation of Perjury), Section 2J1.5 (Failure to Appear by Material Witness), Section 2J1.6 (Failure to Appear by Defendant); Section 2J1.8 (Bribery of Witness), or Section 2J1.9 (Payment to Witness), this adjustment is not to be applied to the offense level for that offense except where a significant further obstruction occurred during the investigation or prosecution of the obstruction offense itself (*e.g.*, where the defendant threatened a witness during the course of the prosecution for the obstruction offense). Where the defendant is convicted both of the obstruction offense and the underlying offense, the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of Section 3D1.2 (Groups of Closely-Related Counts). The offense level for that group of closely-related counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater.

Historical note: **Effective November 1, 1987. Amended effective November 1, 1989 (*see* Appendix C, amendments 251 and 252); November 1, 1990 (*see* Appendix C, amendment 347).**

(1988-1990 Amendments)

251. Section 3C1.1 is amended by deleting "from Chapter Two" immediately following "the offense level."

The purpose of this amendment is to delete an incorrect reference. **The effective date of this amendment is November 1, 1989.**

252. The Commentary to Section 3C1.1 captioned "Application Notes" is amended in note 4 by deleting:

> ", except in determining the combined offense level as specified in Chapter Three, Part D (Multiple Counts). Under Section 3D1.2(e), a count for obstruction will be grouped with the count for the underlying offense. Ordinarily, the offense level for that Group of Closely Related Counts will be the offense level for the underlying offense, as increased by the 2-level adjustment specified by this section. In some instances, however, the offense level for the obstruction offense may be higher, in which case that will be the offense level for the Group. *See* Section 3D1.3(a) In cases in which a significant further obstruction occurred during the investigation or prosecution of an obstruction offense itself (one of the above listed offenses), an upward departure may be warranted (*e.g.*, where a witness to an obstruction offense is threatened during the course of the prosecution for the obstruction offense).",

and inserting in lieu thereof:

> "to the offense level for that offense except where a significant further obstruction occurred during the investigation or prosecution of the obstruction offense itself (*e.g.*, where the defendant threatened a witness during the course of the prosecution for the obstruction offense).

Where the defendant is convicted both of the obstruction offense and the underlying offense, the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of Section 3D1.2 (Groups of Closely-Related Counts). The offense level for that group of Closely-Related Counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater.".

The purpose of this amendment is to resolve an inconsistency between the commentary in this section and the Commentaries in Chapter Two, Part J. **The effective date of this amendment is November 1, 1989.**

347. Section 3C1.1 is amended in the title by deleting "Willfully Obstructing or Impeding Proceedings" and inserting in lieu thereof "Obstructing or Impeding the Administration of Justice."

Section 3C1.1 is amended by deleting "impeded or obstructed, or attempted to impede or obstruct" and inserting in lieu thereof "obstructed or impeded, or attempted to obstruct or impede;" and by deleting "or prosecution" and inserting in lieu thereof, "prosecution, or sentencing."

The Commentary to Section 3C1.1 is amended by deleting the introductory paragraph immediately before "Application Notes" as follows:

> This section provides a sentence enhancement for a defendant who engages in conduct calculated to mislead or deceive authorities or those involved in a judicial proceeding, or otherwise to

willfully interfere with the disposition of criminal charges, in respect to the instant offense.

The Commentary to Section 3C1.1 captioned "Application Notes" is amended by deleting Notes 1-4 as follows:

"1. The following conduct, while not exclusive, may provide a basis for applying this adjustment:

(a) destroying or concealing material evidence, or attempting to do so;

(b) directing or procuring another person to destroy or conceal material evidence, or attempting to do so;

(c) testifying untruthfully or suborning untruthful testimony concerning a material fact, or producing or attempting to produce an altered, forged, or counterfeit document or record during a preliminary or grand jury proceeding, trial, sentencing proceeding, or any other judicial proceeding;

(d) threatening, intimidating, or otherwise unlawfully attempting to influence a co-defendant, witness, or juror, directly or indirectly;

(e) furnishing material falsehoods to a probation officer in the course of a presentence or other investigation for the court.

2. In applying this provision, suspect testimony and statements should be evaluated in a light most favorable to the defendant.

3. This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt is not a basis for application of this provision.

4. Where the defendant is convicted for an offense covered by Section 2J1.1 (Contempt), Section 2J1.2 (Obstruction of Justice), Section 2J1.3 (Perjury), Section 2J1.8 (Bribery of Witness), Section 2J1.9 (Payment to Witness), this adjustment is not to be applied to the offense level for that offense except where a significant further obstruction occurred during the investigation or prosecution of the obstruction offense itself (*e.g.*, where the defendant threatened a witness during the course of the prosecution for the obstruction offense). Where the defendant is convicted both of the obstruction offense and the underlying offense, the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of Section 3D1.2 (Groups of Closely-Related Counts). The offense level for that Group of Closely-Related Counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater.",

and inserting in lieu thereof:

"1. This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a

basis for application of this provision. In applying this provision, the defendant's testimony and statements should be evaluated in a light most favorable to the defendant.

2. Obstructive conduct can very widely in nature, degree of planning, and seriousness. Application Note 3 sets forth examples of the types of conduct to which this enhancement is intended to apply. Application note 4 sets forth examples of less serious forms of conduct to which this enhancement is not intended to apply, but that ordinarily can appropriately be sanctioned by the determination of the particular sentence within the otherwise applicable guideline range. Although the conduct to which this enhancement applies is not subject to precise definition, comparison of the examples set forth in Application Notes 3 and 4 should assist the court in determining whether application of this enhancement is warranted in a particular case.

3. The following is a non-exhaustive list of examples of the types of conduct to which this enhancement applies:

   (a) threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;

   (b) committing, suborning, or attempting to suborn perjury;

   (c) producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding;

(d) destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (*e.g.*, shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to do so; however, if such conduct occurred contemporaneously with arrest (*e.g.*, attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender;

(e) escaping or attempting to escape from custody before trial or sentencing; or willfully failing to appear, as ordered, for a judicial proceeding;

(f) providing materially false information to a judge or magistrate;

(g) providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense;

(h) providing materially false information to a probation officer in respect to a presentence or other investigation for the court;

(i) conduct prohibited by 18 U.S.C. Sections 1501-1516.

This adjustment also applies to any other obstructive conduct in respect to the official investigation,

prosecution, or sentencing of the instant offense where there is a separate count of conviction for such conduct.

4. The following is a non-exhaustive list of examples of the types of conduct that, absent a separate count of conviction for such conduct, do not warrant application of this enhancement, but ordinarily can appropriately be sanctioned by the determination of the particular sentence within the otherwise applicable guideline range:

   (a) providing a false name or identification document at arrest, except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense;

   (b) making false statements, not under oath, to law enforcement officers, unless Application Note 3(g) above applies;

   (c) providing incomplete or misleading information, not amounting to a material falsehood, in respect to a presentence investigation;

   (d) avoiding or fleeing from arrest (*see, however,* Section 3C1.2 (Reckless Endangerment During Flight)).

5. 'Material' evidence, fact, statement, or information, as used in this section, means evidence, fact, statement, or information that, if believed, would tend to influence or affect the issue under determination.

6. Where the defendant is convicted for an offense covered by Section 2J1.1 (Contempt), Section 2J1.2 (Obstruction of Justice), Section 2J1.3 (Perjury or Subornation of Perjury), Section 2J1.5 (Failure to Appear by Material Witness), Section 2J1.6 (Failure

to Appear by Defendant), Section 2J1.8 (Bribery of Witness), or Section 2J1.9 (Payment to Witness), this adjustment is not to be applied to the offense level for that offense except where a significant further obstruction occurred during the investigation or prosecution of the obstruction offense itself (*e.g.*, where the defendant threatened a witness during the course of the prosecution for the obstruction offense). Where the defendant is convicted both of the obstruction offense and the underlying offense, the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of Section 3D1.2 (Groups of Closely-Related Counts). The offense level for that group of closely-related counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater." ....